No. 93-126

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HJALMAR SYVERSEN, LILLIAN A. LOUGHLIN, ET AL.,

Petitioners,

- v -

SUMMIT WOMEN'S CENTER WEST, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Did this court in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. __, 113 S.Ct. 753, 122 L.Ed. 2d 34 (1993) foreclose all resort to 42 U.S.C. Section 1985(3) in instances involving persons obstructing access to abortion clinics in Operation Rescue sit-in protests?

II. In light of *Bray*, does opposition to abortion in the form of Operation Rescue sit-in protests at abortion clinics constitute the animus required under 42 U.S.C. Section 1985(3)?

III. In light of *Bray*, do Operation Rescue sit-in protests at abortion clinics constitute a conscious impairment of the right to abortion or the right to interstate travel?

PARTIES

The Petitioners are as follows: Hjalmar Syversen, Lillian A. Loughlin, Joseph M. Scheidler, Randall A. Terry, John Charles Grant, Jean Pollock, Catherine A. Jersey, William Calvin, Robert E. Cooley, Jayne C. Tuller, Dolores M. Teleski, Eileen M. Haggerty and Operation Rescue. All petitioners were defendants in the district court and appellants in the court of appeals (except that Operation Rescue was not an appellant).

The Respondent is: Summit Women's Center West, Inc. which was a plaintiff in the district court and an appellee in the court of appeals.

Operation Rescue is not a corporation pursuant to Rule 29.1.

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IN THE
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OCTOBER TERM, 1993
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v.

Summit Women's Center West, Inc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The decision of the district court is *Town of West Hartford v. Operation Rescue*, which is reported at 792 F. Supp. 161 (D. Conn. 1992) (App. B:A-23 to A-41). The court of appeals reversed in part the district court in an opinion which is reported at 991 F. 2d 1039 (2d Cir. 1993)(App. A:A-1 to A-22).

JURISDICTION

The judgment of the district court was appealed and the decision of the United States Court of Appeals for the second circuit was decided on April 21, 1993. This court has

jurisdiction under 28 U.S.C. Section 1254(1) to review the judgment of the United States Court of Appeals.

STATUTORY PROVISIONS

42 U.S.C. section 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages

> occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are twelve individuals and Operation Rescue, who are personally and morally opposed to abortion, who as participants in peaceful and non-violent public demonstrations and sit-ins, were enjoined under the Ku Klux Klan Act, 42 U.S.C. Section 1985(3).

Despite this court's clear holding in *Bray v. Alexandria Women's Health Clinic,* 506 U.S. __, 113 S. Ct. 753, 122 L. Ed. 2nd 34 (1993) that the Ku Klux Klan Act is not an appropriate federal remedy against Operation Rescue demonstrations, the United States court of appeals for the second circuit, the court below, although vacating the district court's permanent injunction, has remanded the case with instructions which allow the district court, in a review of its facts, to find that the petitioners violated 42 U.S.C. Section 1985(3) by having an invidious discriminatory animus against women in general and for depriving those women of their right to interstate travel or their right to abortion, all of which is directly contrary to this Court's rulings in *Bray*.

This second circuit ruling is a direct challenge to this Court's decision in Bray and is a clear attempt to circumvent Bray by wrongfully limiting Bray to its facts.

This Court has recently reaffirmed the rule of full civil retroactivity in *Harper v. Virginia Dept. of Taxation*, __ U.S. __, 61 U.S.L.W. 4664, 1993 WL 209718 at page 5-6:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given

> full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. ... Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law *or to treat similarly situated litigants differently.*" (emphasis added)

The second circuit is clearly treating "similarly situated litigants differently" in violation of *Harper*. Not only are the petitioners "similarly situated litigants" as those in *Bray*, but one is the same party, i.e. Operation Rescue.[1]

The petitioners desire that this Court vacate the second circuit's judgment in light of this Court's decision in *Bray* which the second circuit has applied in half-hearted evasive manner. The second circuit should not have left the door open to allow Operation Rescue to be found guilty of a right to travel or abortion deprivation or an animus finding in this case below

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[1] The second circuit began its opinion by acknowledging the role of Operation Rescue in the West Hartford demonstrations:

> The events giving rise to this case were massive anti-abortion demonstrations that took place in West hartford, Connecticut, on April 1, 1989, and June 17, 1989. The demonstrations appear to have been the handiwork of *persons associated with Operation Rescue,* an anti-abortion organization whose activities have been the focus of a substantial corpus of litigation in the federal courts. *See, e.g., Bray v. Alexandria Women's Health Clinic*, __ U.S. __; 113 S.Ct. 753 (1993). . . . (emphasis added)

Town of West Hartford v. Operation Rescue, 991 F.2d at 1040 (A-3).

when Operation Rescue was found not to have violated the same provisions of 42 U.S. C. 1985(3) in the *Bray* case.

The second circuit's niggardly reading of *Bray* must be corrected by this Court by summary order to vacate the judgment of the second circuit and remand for further consideration in light of *Bray*.

A. Course Of Proceedings

The Town of West Hartford originally brought this claim in civil racketeering, under 18 U.S.C. Section 1964(c) with various pendent state claims. The district court granted the town's request for a preliminary injunction. *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn 1989)(App. D: A-75 to A-101). The second circuit vacated the injunction and ordered dismissal of the town's state claims for want of subject-matter jurisdiction because of the frivolous nature of the town's RICO claim. *Town of West Hartford v. Operation Rescue,* 915 F. 2d 92 (2d Cir. 1990), *reh'g denied,* ____ F. 2d ____ (2d Cir. December 26, 1990)(App. C: A-42 to A-74). While that appeal was pending, the present Plaintiff-Respondent intervened in the action asserting federal claims of civil RICO and civil rights violations under 42 U.S.C. Section 1985(3) with various pendent state claims.

On May 12, 1992, the district court granted Respondent's Motion for Summary Judgment in part under a "right to abortion" claim under 42 U.S.C. Section 1985(3), and issued a permanent injunction against the Petitioners. *Town of West Hartford v. Operation Rescue*, 792 F.Supp. 161 (D.Conn. 1992)(App. B: A-23 to A-41).

The second circuit vacated the permanent injunction and remanded to the district court with instructions to reconsider the facts and possibly find a valid 42 U.S. C. 1985(3) claim in

contravention of this Court's decision in *Bray*. *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir. 1993) (App. A: A-1 to A-22).

REASONS FOR GRANTING THE WRIT

I. The second circuit court of appeals has wrongfully limited the legal holdings of *Bray v. Alexandria Women's Health Clinic* to its facts.

A. Animus

In the case below, (*Town of West Hartford v. Operation Rescue*, 991 F.2d at 1048 (A-19 to A-20)) the second circuit interpreted *Bray* as follows:

> To the extent that appellants are contending the *Bray* forecloses all resort to § 1985(3) in all instances involving "persons obstructing access to abortion clinics," we think appellants have over-read what the Court announced. . . . But we are of the view that the Court's analysis of the animus aspect of *Bray* is tied to the facts there adduced: --"[t]he record in this case," __ U.S. at __, 113 S.Ct. at 759; "[g]iven this record." *Id.* at __, 113 S.Ct. at 760. Accordingly, we think that an assessment of the animus aspect of the case at bar requires a further review, in the light of the legal principles relating to animus announced in *Bray*, of the record evidence bearing on appellants' motivation.

> In similar fashion, a determination of whether appellants intended to and did inhibit a right protected by § 1985(3) -- either the Fourteenth Amendment abortion right, protected against the state; or the citizenship right to travel without public or private impediment -- calls for scrutiny of the instant record through the prism of the *Bray* Court's pronouncement that "impairment [of the right] must be a conscious objective of the enterprise." __ U.S. at __, 113 S.Ct. at 762.
>
> Since, in the case at bar, (1) the district court's findings with respect to animus require reappraisal, and (2) the district court saw no occasion to make findings on the allegations of interference with the right to travel, we think that the task of revisiting testimony that the district court heard and we did not is best entrusted to the district court. Accordingly, we will remand this case to the district court for further consideration in the light of *Bray*.

Although this Court in *Bray* did not find it necessary to decide whether women in general is a qualifying class under 42 U.S.C. 1985(3), this Court did conclude that the *Bray* petitioners' opposition to abortion did not reflect an animus against women in general. This Court went on to explain that in order to satisfy the animus requirement of 1985(3), the defendant's demonstrations must be motivated by a purpose (malevolent or benign) directed specifically at women as a class. This Court noted that the district court found that "petitioners defined their rescues not with reference to women, but as physical intervention between the abortionists and the innocent victims and that all petitioners shared a deep commitment to the

goals of stopping the practice of abortion and reversing its legalization." *Bray*, 506 U.S. __, 122 L.Ed. at 46.

The second circuit acknowledged that the district court below found that "defendants clearly expressed purpose is to stop the performance of abortions . . ." *Town of West Hartford v. Operation Rescue*, 991 F.2d at 1043 n.4 (A-8). The district court also found that: "Specifically, the defendants declare that their purpose was 'the goal of rescuing babies who were scheduled to be killed.' Defendants' Statement of Material Facts, Section 4.". *Town of West Hartford v. Operation Rescue*, 792 F.Supp. 161, 167 n.6 (D.Conn. 1992)(A-34).

Given the fact that the Petitioners in the case *sub judice* also include Operation Rescue and that the record is replete with the uncontradicted statements by the defendants that their activities arise out of their intention to rescue innocent children from abortion, it makes no sense to remand this case back to the district court for further fact finding, when it has already found this same non-discriminatory intent on the part of defendants.

Given the common party of Operation Rescue and the virtually identical findings of anti-abortion purpose, the second circuit's remand to the district court for "further fact finding" is nothing more than an attempt to vitiate this Court's holding in *Bray* that Operation Rescue sit-in protests do not come within the purview of 42 U.S.C. Section 1985(3).

The second circuit's remand is an inartful attempt to evade the impact of *Bray*, by leaving the door to the federal court house wide open to continued litigation by opponents of Operation Rescue sit-in protests.

B. Right To Travel

This Court held in *Bray* that in order to violate the right to travel, the right must be "aimed at" and "its impairment must be a conscious objective of the enterprise." *Bray*, 506 U.S. __, 122 L.Ed. 2d at 50. This Court further held that a defendant must have as his purpose at least an intention to interfere with the right to travel. The Court concluded: "That was not shown to be the case here, *and is on its face implausible.* (emphasis added). *Bray*, 506 U.S. __, 122 L.Ed. 2d at 49-50.

As in *Bray*, the defendant's actions in the case *sub judice* are directed against abortion and " . . . it is irrelevant to their opposition whether the abortion is performed after interstate travel." *Bray*, 506 U.S. __, 122 L.Ed. 2d at 51.

In addition, this Court held that to violate the right of interstate travel, the defendants must have either erected barriers to interstate travel or treated interstate travelers different from intrastate travelers. *Bray*, 506 U.S. __, 122 L.Ed. 2d at 50. As in *Bray*, the only barriers to physical movement in this case would have resulted from demonstrations restricting movement in the immediate vicinity of the abortion clinic. As this Court concluded:

> Such a purely intrastate restriction does not implicate the right of intrastate travel, even if it is applied intentionally against travelers from other states, unless it is applied *discriminatorily* against them. (emphasis in original).

The second circuit's remand to the district court to determine" . . . whether appellants intended to and did inhibit a right protected by Section 1985(3)" [*Town of West Hartford v. Operation Rescue*, 991 F.2d at 1048 (A-19)] asks the district

court to reach a conclusion which this Court has already deemed to be "implausible".

C. Right To Abortion

The second circuit instructs the district court on remand to scrutinize the record to learn whether the defendants consciously intended to impair the "right to an abortion". *Id.*, 991 F.2d at 1048 (A-19). This Court stated in *Bray* -- again, an identical Operation Rescue sit-in protest -- that the respondent's claim for a deprivation of the right to abortion must fail ". . . because they have identified no right protected against private action that has been the object of the alleged conspiracy." (122 L.Ed. 2d at 52). The facts in *Bray* are identical to the facts before the district court and the second circuit in this case. In *Bray*, one of the petitioners before this Court was Operation Rescue,

> ". . . whose members oppose abortion and six individuals. Among its activities, Operation Rescue organized anti-abortion demonstrations in which participants trespass on, and obstruct general access to, the premises of abortion clinics. The individual petitioners organized and coordinate these demonstrations." (122 L.Ed.2d at 44).

There is no legally significant difference between the facts in *Bray* and the facts before the lower courts in this case. *The facts are identical.* It can only be concluded that the second circuit too narrowly construed and misread this Court's opinion in *Bray* by limiting it to its facts.

Petitioners submit that it is of utmost importance that this Court maintain uniformity in the circuits in their interpretation of this Court's decisions.

For this reason alone, petitioners ask the Court to grant certiorari and vacate the decision of the second circuit, before its faulty reasoning again spreads to other federal courts, as it did when the second circuit began this improvident foray by the federal courts into 42 U.S.C. Section 1985(3) in *New York State N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). The *Bray* Court ultimately rejected the legal reasoning of the second circuit in *New York State N.O.W. v. Terry*. By issuing a summary order to vacate and remand in light of *Bray*, this Court can once and for all stop the second circuit's continued wrongful use of the Ku Klux Klan Act in the context of Operation Rescue demonstrations.

CONCLUSION

For the foregoing reasons, the petitioners pray that this petition be granted and that the judgment of the United States court of appeals for the second circuit *be vacated by summary order and remanded* for further proceedings consistent with this Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. __, 113 S. Ct. 753, 122 L.Ed. 2nd 34 (1993). This

Court must not allow the second circuit to so narrowly apply this Court's holding in *Bray* that *Bray* is in effect vitiated.

Respectfully submitted,

Dated: New Milford, Connecticut
July 19, 1993

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